154-209

154-209

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 716.

THE CHICAGO, KANSAS AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CLIFFORD R. PONTIUS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

RECORD FILED JUNE 2, 1894.

(15,600.)

(15,600.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 716.

THE CHICAGO, KANSAS AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CLIFFORD R. PONTIUS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Page.
Petition for writ of error	1
Petition in error	2
Petition in district court	4
Trial and judgment in district court	5
Opinion in supreme court	7
Writ of error	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 9, 1895.

(Record, pp. 1 and 2.)

In the Supreme Court of the United States.

THE CHICAGO, KANSAS & WESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.
CLIFFORD R. PONTIUS, Defendant in Error.

Petition for Writ of Error.

Comes now the said plaintiff in error, The Chicago, Kansas & Western Railroad Company, and says that in the records and proceedings in the above-entitled cause heretofore decided in the supreme court of the State of Kansas there is manifest error, in this, to wit:

First. That the said court rendered judgment against the plaintiff in error and in favor of the defendant in error.

Second. That it appears from the record in said cause that the defendant in error was at the time of the injuries complained of employed by the plaintiff in error as a bridge carpenter, engaged and assisting in the construction of bridges during the construction of the railroad of the said railroad company, and that while so engaged in the construction of bridges he received the injury complained of by reason of the alleged negligence or carelessness of a fellow-servant, and that for said injuries the said plaintiff in error has been held liable; that under the laws of the State of Kansas bridge corporations or private individuals engaged in the construction of bridges would not be or would not have been liable to one of their employés for the negligence of a fellow-employé under the same facts and circumstances as shown in the record in this case; that the said supreme court of the State of Kansas held that the plaintiff in error was liable to the defendant in error under chapter 94 of the Laws of Kansas, 1874, page 143, entitled "An act to define the liability of railroad companies in certain cases," the said supreme court of the State of Kansas holding that the said act of the legislature was applicable to this case; that it was contended by the plaintiff in error that if so considered and applied the said act aforesaid of the legislature of the State of Kansas would be in contravention of the fourteenth amendment to the Constitution of the United States; that the supreme court of the State of Kansas in its decision in said case decided against the said plaintiff in error and held that the said act of the legislature of the State of Kansas aforesaid was not in contravention of the fourteenth amendment to the Constitution of the United States. Plaintiff in error says that the said act of the legislature of the State of Kansas so construed by its supreme court and by virtue of other decisions of the said court under said law is in contravention of the fourteenth amendment to the Constitution of the United States and denies to the said plaintiff in error the equal protection of the laws of said State; that under

the laws and decisions of the State of Kansas bridge corporations or individuals engaged in the business of constructing bridges would not be liable under the same facts and circumstances as shown by the record in this case.

Third. That the said supreme court of the State of Kansas erred in sustaining the instruction given by the trial court in said case, holding that under the aforementioned act of the legislature of the State of Kansas the said railroad company, under the facts and circumstances of this case, would be liable for the injury sustained by the defendant in error on account of the negligence of a coemployé or fellow-servant, when under the common law of the State of Kansas as applicable to other corporations or private individuals and under the same facts and circumstances there would exist no such liability; all of which will more fully appear from the record in said case.

Wherefore your petitioner respectfully prays that a writ of error may issue out of this court, directed to the supreme court of the State of Kansas, commanding the said court to certify and send to this court a full and complete transcript of the record and all proceedings of said supreme court of the State of Kansas in said cause wherein The Chicago, Kansas & Western Railroad Company is plaintiff in error and the said Clifford R. Pontius is defendant in error, and that your petitioner may have such other and further relief and remedy in the premises as to this court may seem proper, and that the said judgment of the said supreme court of the State of Kansas in said cause and every part thereof may be reversed by this honorable court; and your petitioner will ever pray.

A. A. HURD,
ROBERT DUNLAP,
Attorneys for Plaintiff in Error.

6818. Chicago, Kansas & Western R'l'd Co. *vs.* Clifford R. Pontius. Petition for writ of error. Filed Nov. 23, 1893. C. J. Brown, clerk supreme court.

* * * * * * *

(Record, pp. 4 and 5.)

In the Supreme Court of the State of Kansas.

CHICAGO, KANSAS & WESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.
CLIFFORD R. PONTIUS, Defendant in Error. } 6818.

Petition in Error.

The Chicago, Kansas & Western Railroad Company, plaintiff in error, complains of said Clifford R. Pontius, defendant in error, for that said defendant in error upon the 15th day of November, 1889, at a regular term of the district court of Dickinson county, Kansas, recovered a judgment by the consideration of said court against said

plaintiff in error for the sum of two thousand dollars and costs of suit in a certain action then pending in said court, wherein the said Clifford R. Pontius was plaintiff and said Chicago, Kansas & Western Railroad Company was defendant, a copy of the record and proceedings in which cause, duly certified, is hereto attached, marked "Exhibit A," and made a part of this petition in error, and plaintiff in error avers that there is error in said record and proceedings, in this, to wit:

1st. That the said court erred in the admission of certain evidence on the trial of said cause over the objection of said railroad company.

2nd. That the court erred in excluding certain evidence offered by said plaintiff in error on the trial of said cause.

3rd. That the said court erred in the instructions which it gave to the jury on the trial of said cause.

4th. That the said court erred in overruling the demurrer to the evidence offered by said Clifford R. Pontius filed by said railroad company in said cause.

5th. That the said court erred in refusing to give the instructions to the jury which said railroad company prayed the said court to give.

6th. That said court erred in submitting to the jury on the trial of said cause the special questions of fact offered by said defendant in error.

7th. That said court erred in overruling the motion for a new trial of said cause filed by said railroad company.

8th. That said judgment was rendered in favor of said Clifford R. Pontius, defendant in error, when, according to the law of the land, it should have been rendered in favor of said Chicago, Kansas & Western Railroad Company, plaintiff in error.

Wherefore plaintiff in error prays that said judgment so rendered may be reversed, vacated, set aside, and held for naught, and that it be restored to all things it has lost by reason thereof, and for such other and further relief as it may be entitled to.

G. R. PECK,
A. A. HURD,
ROB'T DUNLAP,
Attorneys for Plaintiff in Error.

Precipe.

To the clerk of the supreme court:

Please issue summons in error in the above-entitled cause, directed to the sheriff of Dickinson county, to be served upon defendant in error or upon John Mahan, his attorney of record, returnable according to law.

A. A. HURD,
Attorney for Plaintiff in Error.

Filed June 16, 1890.

C. J. BROWN,
Clerk Supreme Court.

* * * * * * *

(Record, pp. 7 and 8.)

Be it remembered that on this seventh day of September, A. D. 1888, *that* the plaintiff, Clifford R. Pontius, filed in the district court of Dickinson county his petition in words and figures as follows, to wit:

STATE OF KANSAS:

In the District Court of Dickinson County.

CLIFFORD R. PONTIUS, Plaintiff,
versus
THE CHICAGO, KANSAS AND WESTERN RAILROAD COMPANY, Defendant. } Petition.

The said Clifford R. Pontius, plaintiff, complains of The Chicago, Kansas and Western Railroad Company for that at the time of the committing of the grievance hereinafter mentioned the said defendant was possessed of — certain railroad in the counties of Greenwood, Chase, Marion and Dickinson, and Cloud, in the State of Kansas, which said railroad was in the process of construction by the said defendant company, and the said plaintiff at and before the time of the injury hereinafter mentioned was in the employ of the said defendant as a mechanic and laborer at and for certain hire afterward agreed upon by said parties in that behalf; and the plaintiff, under instructions by him received from said defendant through its duly appointed agents and servants, was engaged upon the construction of a certain bridge then being erected by said defendant, by its duly appointed agents and servants, across and over the Verdigris river, in the said county of Greenwood, State of Kansas, said bridge being so constructed for the support of the bed and track of the said defendants' railroad, and at the time of the injury complained of, under the directions of the defendants, given to the plaintiff through its duly appointed agents and servants, he was engaged in taking down and removing the temporary structure erected by said defendants to support the superstructure of said railway bridge; that in so doing the defendant, by its said agents and servants, were using a derrick and apparatus furnished by said defendant for that purpose and for the purpose of taking down the timbers and materials contained in said temporary structure erected for the support of said railroad bridge; that among other tackle and appliances so used by the said defendant was a cable with chain and hook thereto attached used for the purpose of elevating and lowering said timbers, which said appliance became broken and out of repair, but which the said defendant, by its foreman in charge of said work, continued to use in and about said work, though by reason of the same being out of repair said operation of said work was rendered very dangerous and said appliance was at the time of said injury imperfect and unfit for said use; and that said defendant, by its foreman in charge of said work, in attempting to elevate the timbers of said bridge, by reason of the carelessness and negli-

gence of said foreman in the use of said appliances—the said timber held therein fell upon the leg of the said plaintiff, crushing the plaintiff's said leg and inflicting thereon certain painful wounds and bruises, whereby said plaintiff was then and there, in said county of Greenwood, bruised, hurt, and wounded in consequence thereof and became sick, sore, lame, and disabled, so remaining so for the space of eight months then next ensuing, and was put to great expense in and about the endeavor to cure said bruises and wounds and did expend therefor the sum of one hundred dollars, and also during all of that time was unable and was thereby prevented from attending to his business and lost all the wages he could otherwise have earned, to wit, the sum of eight hundred dollars, and he was put to great bodily pain and suffering during all of said time, to the damage of the said plaintiff in the sum of two thousand dollars; that by reason of the said wound the said plaintiff has been made permanently lame and disabled, to his great damage in the sum of three thousand dollars.

That all of said wrongs and injuries were done to him by the defendant and its servants without any negligence upon his part.

Wherefore he prays judgment against the defendant company for the sum of five thousand dollars, his damages so as aforesaid sustained.

JNO H. MAHAN,
Plaintiff's Attorney.

To the clerk:

Issue summons in this cause to the sheriff of Dickinson county.

JOHN H. MAHAN,
Plaintiff's Attorney.

* * * * * * *

(Record, p. 51.)

CLIFFORD R. PONTIUS, Plaintiff,
versus
THE CHICAGO, KANSAS AND WESTERN RAILROAD COMPANY, Defendant.

On this — day of September, 1889, this cause comes on to be tried, and the plaintiff comes by Jno. H. Mahan and the defendant by Stambaugh, Hurd and Dewey, its attorneys, and also comes a jury of twelve lawful jurors of the said county of Dickinson *court* (name the jurors here, Mr. Clerk), who, being first duly empaneled and sworn, take their seats in the jury box and hear the evidence and the charge of the court and listen to arguments of counsel, and then retire to the jury-room in charge of a sworn bailiff to deliberate upon their verdict, and afterwards they return into court their verdict and special findings, to wit: (Now, Mr. Clerk, copy the verdict and special findings here) and thereupon the defendant files its motion for a new trial, and on the 12th day of October, 1889, said motion for a new trial comes on to be heard, and counsel waived argument thereon for the reason that the question of law had been presented

and argued upon the trial of the case, and said motion was therefore denied, and the defendant excepted to said ruling denying said motion for a new trial, and now, on this fifteenth day of November, it is by the court considered and adjudged that the plaintiff, Clifford R. Pontius, have and recover of and from said Chicago, Kansas and Western Railroad Company the said sum of two thousand dollars awarded by said jury, and also his costs herein, taxed at $—, and hereof let execution issue; to which judgment the defendant excepts, and on his motion is allowed sixty days from this date to make and serve a case made for the Supreme Court.

Approved.

M. B. NICHOLSON, *Judge.*

* * * * * * *

(Record, pp. 68 to 73 incl.)

CHICAGO, KANSAS & WESTERN RAILROAD COMPANY
vs.
CLIFFORD R. PONTIUS. } No. 6818.

Error from Dickinson County. Affirmed.

Syllabus by the Court—Allen, J.

A bridge carpenter, employed by a railroad company in loading timbers on a railroad car for transportation to another point on the company's line, may recover damages from the company, under section 93, chapter 23, General Statutes 1889, for injuries sustained while so employed occasioned by the negligence of a coemployee. R'y Co. *vs.* Harris, 33 Kas., 416; R. R. Co. *vs.* Koehler, 37 Kas., 463.

All the justices concurring.

CHICAGO, KANSAS & WESTERN RAILROAD COMPANY
vs.
CLIFFORD R. PONTIUS. } No. 6818.

Error from Dickinson County.

Statement.

Clifford R. Pontius was employed by the defendant company as a bridge carpenter and worked in that capacity at various points on the line of defendant's road. A bridge was constructed across the Verdigris river in Greenwood county. The false work used for support in its construction was taken down, and the timbers of which it was composed were hoisted and loaded into cars on the bridge, to be transported to some other point on defendant's road. The timbers were muddy and slippery. The mode of hoisting them was to attach a rope or chain to the timbers and to raise them by means of a pile-driver. When a stick was raised to a sufficient height a rope was thrown around the lower end of it and a number of men, of whom plaintiff was one, would pull it out on the car. A chain had been used on the end of the rope to hold timbers which

were being hoisted, and several pieces had been raised in that way. The chain, however, was thrown aside and one piece was raised with the rope. When the men undertook to pull it back on the car the rope slipped off, the timber fell, and caused the injury for which the plaintiff sues. The jury rendered a verdict in favor of the plaintiff for $2,000.00.

CHICAGO, KANSAS & WESTERN RAILROAD COMPANY
vs.
CLIFFORD R. PONTIUS. } No. 6818.

Error from Dickinson county. Affirmed.

The opinion of the court was delivered by ALLEN, *J.*:

It is contended by counsel for plaintiff in error that section 93, chapter 23, of the General Statutes of 1889 has no application to this case. The section reads:

"SECTION 93. Every railroad company organized and doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés to any person sustaining such damage."

It is urged that the plaintiff, being employed as a bridge carpenter, was not engaged in the perilous business of operating a railroad; that the only ground on which the statute can be sustained is that the business of operating railroads is peculiarly perilous, and that the State has the right to impose liability which did not exist at common law in the exercise of its police power; that the fact that the defendant is a corporation gives the legislature no right to impose on it a liability to which other corporations and private persons are not subjected; that, in so far as its terms include employés not subjected to the peculiar hazards attending the operation of a railroad, it is in conflict with the first section of the fourteenth amendment of the Constitution of the United States, which reads:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is argued that the plaintiff was a bridge builder; that the legislature has not selected bridge building as a business attended with peculiar hazards, and that a railroad company cannot be subjected to any greater liabilities to its employés who are engaged in building its bridges than any other company or private individual engaged in the same business would rest under.

It is true that the record discloses that the plaintiff's general em-

ployment was as a bridge carpenter, but at the time the accident happened he was engaged not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road. In Missouri Pacific Railroad Co. *vs.* Haley, 25 Kas., 35, it was held that "a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car is within the statute making railroad companies liable to their employés for injuries resulting from the negligence of coemployés."

In the case of Railway Company *vs.* Hackey, 33 Kas., 298, the constitutionality of this law was drawn in question and this court held it valid. The case was taken to the Supreme Court of the United States, where the judgment of this court was affirmed, and it was held that this statute "does not deprive a railroad company of its property without due process of law, and does not deny to it the equal protection of the laws, and is not in conflict with the fourteenth amendment of the Constitution of the United States in either of these respects." Railway Company *vs.* Mackey, 127 United States, 205. In Railway Company *vs.* Beckwith, 129 U. S., 26, a provision in the code of Iowa authorizing the recovery of double the value of stock killed, or damages caused thereto by a railroad when the injury took place at a point on the road where the corporation had a right to fence it and failed to do so, was before the court for its consideration and was attacked on the same constitutional ground as the statute we have under consideration, but the court held it valid. In Union Pacific Railway Company *vs.* Percy B. Harris, 33 Kas., 416, it was held that a section man employed by a railway company to repair its road-bed and to take up old rails out of its track and put in new ones, who is injured without his fault by the negligence of his coemployé by permitting an iron rail intended to be placed in the track to fall upon him while he is assisting in removing the rail from a push-car on the track, is within the terms of section 1, chapter 93, Session Laws of 1874," and entitled to recover for injuries received through the negligence of a coemployé.

In Railroad Co. *vs.* Koehler, 37 Kas., 463, it appeared that plaintiff's intestate received injuries while loading rails on a car to be taken to other portions of the company's road, from which he died, and it was held that "the character of the employment and services of Koehler at the time of the injury places him within the provisions of the act which makes railroad companies liable to their employés for damages resulting from the negligent acts of other employés."

These cases are decisive of the one now before us. In the Harris case the injury was received while unloading rails from a push-car to be used in repairing the track and in the Koehler case the injury was sustained while loading rails to be transported to another part of the line. In this case the plaintiff was injured while on a car assisting in loading timbers to be transported over the defendant's road to some other point. The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case

nor does it matter that the road was newly constructed nor whether it was in regular operation or not, the injury happened to the defendant while he was engaged in labor directly connected with the operation of the road, and the statute applies even though it should be given the construction counsel places on it. It is wholly unnecessary to comment on the question as to common-law liability or as to the grade of the employment of the plaintiff's fellow-servant through whose negligence he was injured, for the liability of the company is the same whether he was a foreman or a superintendent or merely a colaborer of equal station. There was ample evidence to establish negligence in using the rope to hoist the timber.

Complaint is made of other instructions given by the court, but we perceive no substantial error in them, and our attention is not called to anything we deem worthy of especial mention.

The judgment is affirmed.

All the justices concurring.

* * * * * * *

(Record pp. 75, 76, & 77.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the supreme court of the State of Kansas before you, being the highest court of law or equity of said State in which a decision could be had in said suit between The Chicago, Kansas & Western Railroad Company, plaintiff in error, and Clifford R. Pontius, defendant in error, wherein it was claimed that a certain statute of the State of Kansas was invalid as in contravention of the fourteenth amendment to the Constitution of the United States, and the decision was against the claim set up by the plaintiff in error under the said fourteenth amendment to the Constitution of the United States, a manifest error hath been, to the great damage of the said The Chicago, Kansas & Western Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of the Circuit Court of the United States, District of Kansas.]

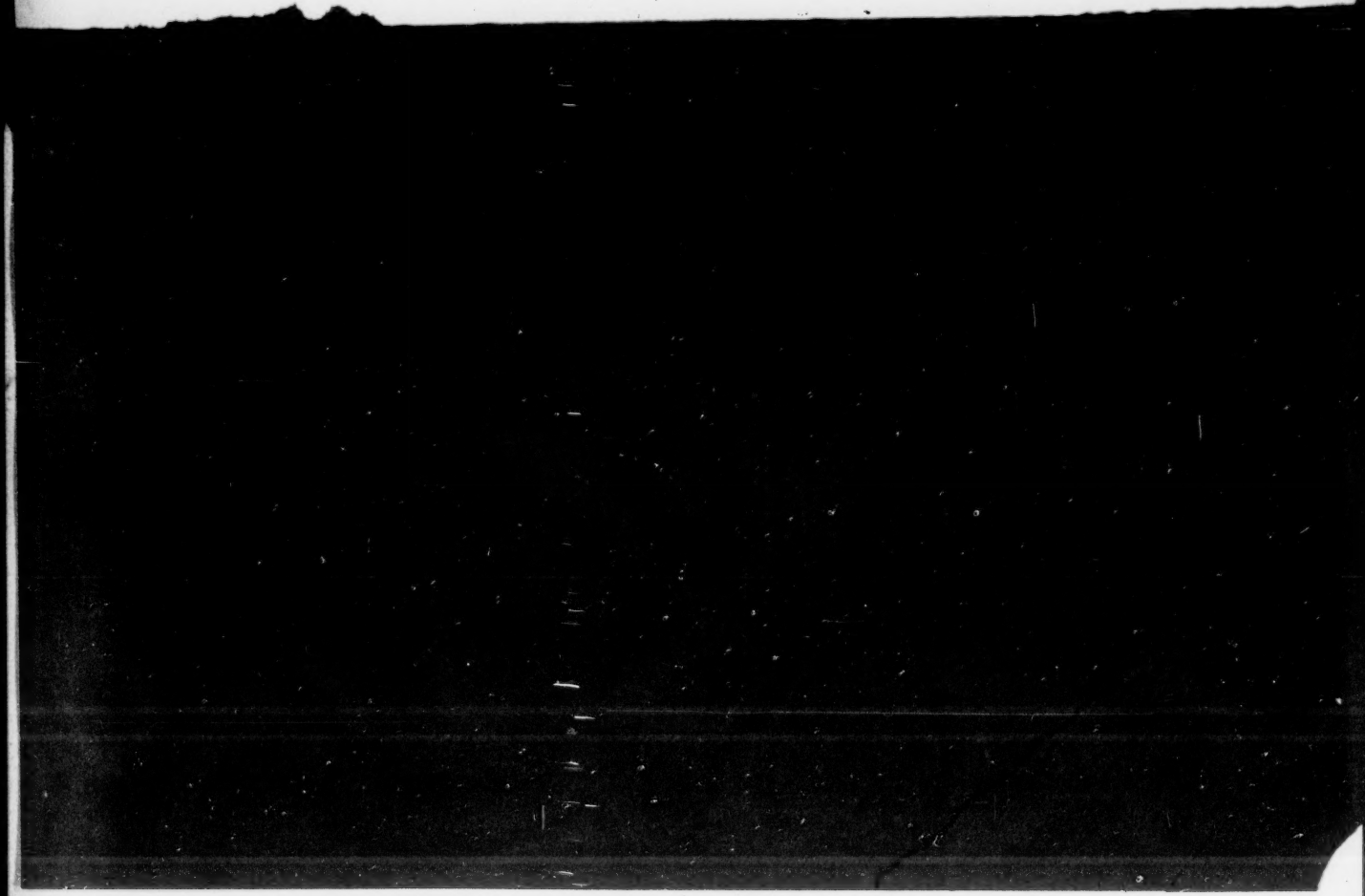
GEO. F. SHARITT,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Allowed by—

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

(Endorsed:) 6818. Chicago, Kansas & Western R'l'd Co. *vs.* Clifford R. Pontius. Writ of error. Filed Nov. 23, 1893. C. J. Brown, clerk sup. court.

* * * * * * *



IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1894.

The Chicago, Kansas & Western R R. Co., *Plaintiff in Error,*
vs.
Clifford R. Pontius, *Defendant in Error.*
No. 716.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM UNDER RULE 6.

The contentions of the plaintiff in error are as follows:

1st. That the chapter 94 of the laws of Kansas 1874, page 143, making rail companies liable to their employes for damages occasioned by the negligence of their co-employes, violates

the provision of the Fourteenth Amendment to the constitution of the United States. Page 1 of the printed extract from the transcript of the case.

2nd. That the Supreme Court of Kansas in deciding the case, by holding the state law to be applicable to the case of the defendant in error, rendered the said law by such construction thereof obnoxious to the provision of said Fourteenth Amendment because they say that it establishes a different rule for the ordinary bridge builders to that applied to railroad companies engaged in building their own bridges.

The first contention was met by this court and decided adversely to the plaintiff in error in 1887 in the case of the Missouri Pacific Railway Company vs. Mackey reported in 127 United States Reports at page 205.

The second contention is not well taken because in the opinion of the Supreme Court of Kansas in the case that court states the fact to be that the defendant in error at the time of receiving the injuries complained of was not engaged in his usual avocation of bridge carpenter but was, by the direction of his superintendent, at work in loading a train of cars on the plaintiff in error's line with timbers of the false or temporary structure of the bridge for transportation over its line: that the fellow employe guilty of the negligence causing the injury was the person in charge of the pile driver on the pile driver car used to elevate the timbers to and upon the car to be placed there by defend-

ant in error and other employees likewise engaged thereon, and a co-employe engaged in bridge building, and that the negligence consisted in omitting to use a chain to grasp the timber. See pages 6, 7, 8 and 9 of the printed extracts from the transcript. So that in fact the Supreme Court of Kansas did not hold as contended but on the contrary decided expressly that the defendant in error was not engaged at the time as a bridge carpenter but was engaged in one of the branches of the perilous employment of railroading. See the last complete paragraph of the Court's opinion on page 7 of the printed extract and the following paragraph beginning on page 7 and concluded on page 8 of the printed extracts.

It would seem that paragraph 2 of Rule 23 of this Court ought to be applied in this case and we respectfully request the same.

JOHN H. MAHAN,
Attorney for Defendant in Error.

15-7-209

FILED.
FEB 27 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE CHICAGO, KANSAS AND WESTERN RAILROAD CO.

v.

CLIFFORD R. PONTIUS.

No. 716.

IN ERROR TO THE SUPREME COURT OF KANSAS.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE CHICAGO, KANSAS & WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

CLIFFORD R. PONTIUS.

No. 716.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The above case comes to this Court on writ of error from the Supreme Court of the State of Kansas, the Supreme Court of that State having affirmed a judgment against the plaintiff in error for the sum of $2,000. The question involved is the constitutionality of an act of the Legislature of Kansas passed in 1874. The decision of the Supreme Court of Kansas is found in the record (p. 6), and is also reported in 34 Pac. Rep. 739. Pontius had instituted suit in the State Court of Kansas to recover for personal injuries received while in the employ of the railroad company. From the record in this case and

from the opinion of the Court it appears that in the years 1887 and 1888 the railroad company was engaged in constructing its railroad in the State of Kansas; that it was also engaged in constructing bridges over certain rivers in said State, and over which its railroad was to be constructed. From November, 1887, until February 20, 1888, the date of the accident, Pontius had been employed by the railroad company as a bridge carpenter to assist in the construction of bridges. On the day of the accident, and for some time prior thereto, he had been engaged as such bridge carpenter in assisting in the construction of a bridge over the Verdigris river. In order to construct the bridge it was necessary to erect what was called false work, or a temporary structure, which, as the bridge neared completion, was removed. While engaged as a bridge carpenter, on the day of the accident, he was directed to assist a gang of laborers in the removal of certain heavy timbers constituting the false work. These timbers had been taken down and were being hoisted or lifted by means of a rope operated over a pulley, and were then laid down upon a flat car which was standing upon the bridge. This car was stationary and wholly disconnected from any train. It is said in the opinion that the timbers were being thus removed and laid upon the flat-car for the purpose of being transported. While the evidence fails to show the purpose for which the timbers were being placed upon the flat car, we deem this assertion in the opinion of the Court wholly immaterial, as in this work the plaintiff was in no manner subjected to any perils peculiarly incident to the business carried on by railroad companies, the perils and dangers being the same as those to which any bridge carpenter or employé of a bridge company or individual engaged in constructing a bridge would be sub-

jected. While one of the timbers was being lowered, for some reason or other it slipped out of the rope, fell against the leg of the plaintiff and injured him. The trial Court gave the following instruction to the jury:

"This action was brought under this section of the "statute which I will read to you: 'Every railroad com- "'pany organized or doing business in this State shall be "'liable for any damages done to any employé of such "'company in consequence of any negligence of its "'agents or by mismanagement of its engineers or other "'employés, to any person sustaining such damages.' "* * * If the plaintiff did receive those injuries while "in the employ of the company, and the injuries were "the result of the carelessness and negligence of the "agents and servants of the company, then the plaintiff "would be entitled to recover, and the amount of his re- "covery would be determined by you from the testi- "mony," etc.

This instruction was complained of by the railroad company as erroneous, and it was insisted that if the statute of the State were so construed as to make a railroad company liable, when under the same facts, circumstances, and conditions a bridge company or a private individual engaged in the same kind of work would not be liable to an employé for the negligence of a fellow-employé, the statute so construed would be unconstitutional, and in contravention of the Fourteenth Amendment to the Federal Constitution, as denying to the railroad the equal protection of the laws. This claim on behalf of the railroad company was denied. From the syllabus of the Supreme Court, which in Kansas contains the law of the case, that Court held that a bridge carpenter employed by a railroad company in loading timbers on a railroad-car on the company's line may recover damages from the

company under the section of the statute which will hereafter be set out at large, for injuries sustained while so employed, occasioned by the negligence of a co-employé.

ARGUMENT.

If the Act of 1874 be Construed as it was by the Supreme Court of Kansas so as to Make a Railroad Company Liable While Engaged in the Business of Building a Bridge, While Under the General Law of the State a Bridge Company or a Private Individual Would not be Liable Under the Same Circumstances, the Act so Construed is Unconstitutional.

The act of 1874, which was construed so as to be applicable to this case and upheld by the Supreme Court of Kansas, is Chapter 93, found on page 143 of the Laws of Kansas, 1874, and reads as follows:

"Section 1. Every railroad company organized or "doing business in this State shall be liable for all dam- "ages done to any employé of such company, in conse- "quence of any negligence of its agents or by any mis- "management of its engineers or other employés, to any "person sustaining such damage."

The foregoing act is in no sense applicable to bridge companies or private individuals engaged in the construction of bridges of any kind. The railroad company, instead of building the bridge itself, might have contracted with a bridge company to have that work done, and the bridge company, under the laws of Kansas, would not have been held liable to an employé for an injury received through the negligence of a fellow-employé.

In the case of *Beeson* v. *Busenbark* (44 Kan. 669), the Supreme Court of Kansas held, construing the foregoing act, that it applies to every railroad company organized in the State or doing business in the State, but its provisions do not include firms, partnerships, or individuals having servants or employés engaged in working upon the road or trains of a railroad corporation, and that it did not apply to a firm of individuals engaged in constructing a railroad in the State of Kansas. So that it will be seen that this law, as construed by the Supreme Court of Kansas, and particularly as construed with reference to the case at bar, imposes upon a railroad company a liability which is not imposed upon bridge companies organized under the laws of the State, or upon private individuals engaged in the same kind of work. The fact that was assumed by the Court in the case at bar—though the evidence hardly justified it—that the timbers were intended to be transported at some future time to some other point on the railroad, can have no bearing upon the consideration of this question, because the same fact might exist in the construction of a railroad bridge by a bridge corporation or a private individual. It added nothing to the usual dangers or risks. It is well known that in many businesses, such as milling, coal mining, manufactories of various classes or machinery, individuals or corporations own cars which are to be loaded by their employés and to be thereafter transported along the line of railroad, and no liability would be imposed upon such owners if their employés were injured, while so loading such cars, through the negligence of fellow-employés. The plaintiff, in working upon the stationary flat-car, disconnected from any train, was in nowise subject to any of the perils incident to that peculiar feature of the railroad business which is not incident to any

other kind of business carried on in the State. The Court should have construed the foregoing act as only applicable to one who received an injury by reason of perils which were peculiarly hazardous and connected with that branch of the business of railroading carried on only by railroad companies, and not carried on by any other class in the community, but the Court gave the law its broadest construction, and held that it applied to a railroad company in the case at bar, when under the same facts, circumstances, and conditions another corporation or a private individual would not be held liable by the same Court under the law. So construed, it violated that principle contained in the Fourteenth Amendment to the Federal Constitution, which reads as follows:

"Nor shall any State deprive any persons of life, lib-
"erty, or property without due process of law, nor deny
"to any person within its jurisdiction the equal protection
"of the laws."

It cannot be disputed, for it is well settled that a corporation organized under the laws of a State is a person within the meaning of this provision.

Santa Clara County v. *Southern Pac. Rld. Co.*, 118 U. S. 394.

Therefore, the fact that railroad companies may be corporations under the laws of the State does not deprive them of the protection of this clause of the Federal Constitution. No justification, therefore, for partial or discriminating legislation can be based upon the mere fact that railway companies are corporations. There must exist some other reason. No justification for partial or class legislation can be based upon the distinction that it is directed against a class of artificial persons instead of a

class of natural persons. If the Legislature attempted to single out those of African descent or those of German origin, and had created a liability against them based solely upon such ground, there would be no hesitation in declaring such a law unconstitutional. (*In re Lee Sing et. al.*, 43 Fed. Rep. 359.)

The provision of the Fourteenth Amendment, above quoted, was aimed against so-called class legislation that has no foundation in reason.

In the *Civil Rights Cases* (109 U. S.), Mr. Justice Bradley, delivering the opinion of the Court, says, upon page 24:

"The Fourteenth Amendment extends its protection to "races and classes, and prohibits any State legislation "which has the effect of denying to any race or class, or "to any individual, the equal protection of the laws."

If a class of men cannot be discriminated against simply because they may have yellow skins, or are of a certain extraction, what justification can there be for discriminating against other persons simply because they are artificial, since the amendment was designed for the protection of the artificial as well as the natural persons? Behind the artificial person are the natural persons composing it.

In Minnesota there exists a statute similar in language to that in force in Kansas. In *Lavallee* v. *St. P., M. & M. Ry. Co.* (41 N. W. Rep. 974), it was held by the Supreme Court of Minnesota that that statute making railroad companies liable to an employé for injuries caused by the negligence of a co-employé, as constitutionally construed, applied only to those employés engaged in operating the railroad, and so exposed to the peculiar perils of that business; that if it were given a broader interpreta-

tion it would conflict with the provisions of the Fourteenth Amendment to the Federal Constitution.

In speaking of the power of the Legislature to classify, the Court says in that case:

"The classification shall be made upon some apparent "natural reason, some reason suggested by necessity, by "such a difference in the situation and circumstances of "the subjects placed in different classes as suggests the "necessity or propriety of different legislation with re-"spect to them."

The Court then continues:

"The frequency and magnitude of the dangers to "which those employed in operating railroads are ex-"posed, the difficulty, sometimes impossibility, of escaping "from them with any amount of care, when they come; "the fact that a great number of men are employed, co-"operating in the same work, so that no one of them can "know all the others, their competency, skill, and care, "so that he may be said to voluntarily assume the risk "arising from the want of skill or care by any one of the "number, are a sufficient reason for applying a rule of "liability on the part of the employer to the employé so "employed different from that ordinarily applied be-"tween master and servant. *But no just reason can be "suggested why such difference should be founded, not on "the character of the employment nor of the dangers to "which those employed are exposed, but on the character "only of the employer. We can see why the employer's "liability should be greater when the business is that of "operating a railroad, but cannot see why one individual or "corporation should be held to a rule of liability different "from that applied to another, when the employment and "its hazards are precisely the same.*"

There is *also* a clean-cut opinion by that able jurist, Judge Mitchell, in the case of *Johnson* v. *St. P. & D. R.*

R. Co., decided by the Supreme Court of Minnesota and reported in 45 N. W. Rep. 156. There it was held, following the case of *Lavallee* v. *The Railroad Company*, *supra*, that the law of Minnesota applied only to the employés of a railroad corporation exposed to the peculiar hazards connected with the use and operation of the road; that if it were given a different or broader interpretation such construction would render the law unconstitutional, as in contravention of the Fourteenth Amendment. In that case a crew of men, of which the plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened and was blown shut by the wind, and injured the plaintiff while engaged in work between the stationary part of the bridge and the draw. It was held that the defendant was not liable.

In speaking of the constitutional construction to be placed upon the act, Judge Mitchell says:

"Neither would it relieve the act of the imputation of "class legislation that it applies alike to all railroads. It "has been sometimes loosely stated that special legisla- "tion is not class 'if all persons brought under its influ- "'ence are treated alike under the same conditions.' "But this is only half the truth. Not only must it treat "alike under the same conditions all who are brought "'within its influence,' but in its classification it must "bring within its influence all who are under the same "conditions. Therefore, if a distinction is to be made "between railroad corporations and other employers as "respects their liability to their employés, it must be "based upon some difference in the nature of the em- "ployment, *and can only extend to cases where such dif-* "*ference exists.*"

After showing that it is illogical to base any distinction

merely upon the character of a part of the employment, but that the only sound distinction is to be placed upon the circumstances and the manner in which the injury occurred, and therefore the liability arose, he continues in that case as follows :

" *Therefore, after mature consideration, our conclusion* " *is, that if any limitation is to be placed by the courts* " *upon the application of this statute (and on constitutional* " *grounds there must be) the only one which will furnish* " *any definite or logical rule is to hold that it only applies* " *to those employés who are exposed to the peculiar hazards* " *incident to the use and operations of railroads, and whose* " *injuries are the result of such dangers.* We do not mean " to say that there may not be reasons suggested by some " differences in the nature of the employment which would " warrant the legislature in placing some other hazards " within the provisions of such a law ; but, if the courts " should attempt to impose upon the general language of " this statute any other limitation than the one suggested, " they would all be at sea without either rudder or com- " pass. Applying the test suggested, it is clear that plain- " tiff's case is not within the provisions of the act. The " crew of men, of which the plaintiff was one, was engaged " in repairing the property of defendant's railroad. In " doing this work it was necessary to leave the draw partly " open. Plaintiff was at work between the stationary part " of the bridge and the draw, when the wind blew the " draw shut and injured him. The draw might and should " have been fastened open, which was omitted to be done " through the negligence of the foreman of the crew. " Plaintiff was not engaged in operating the road, nor was " his injury caused by any of the hazards incident to its " operation any more than the case of the helper in the " repair shops in the Lavallee case. As suggested by " counsel for defendant, suppose there had been a wagon " bridge over the St. Louis river, alongside of this rail- " road bridge, and one of the crew engaged in repairing " it had been injured under like circumstances. He could

" not have recovered from his employer. Yet the actual " situation, both as to the nature of the employment and " the cause of the injury, would have been the same in " either case."

It will readily be seen that the true distinction is clearly set forth in the above case. Had the plaintiff been employed by an individual or a bridge company in the construction of a bridge over a river, he would have been subjected to the same dangers, and yet if injured under the same circumstances as in this case, he could not recover. It would be manifestly unreasonable, therefore, to hold the railroad company liable in damages to him, when under the same circumstances and conditions a bridge company or a private individual would not be liable to one of its employés.

To the same effect is a more recent decision of the Supreme Court of Minnesota. See the case of *State ex rel.* v. *Sheriff of Ramsey County* (51 N. W. Rep. 112). In that case it was held that classification could not be arbitrarily made. A statute must treat alike all of the class to which it applies, and must bring within its classification all who are similarly situated or under the same conditions; that the classification attempted to be made in the act of the Legislature of Minnesota declaring the emission of dense smoke within the city of St. Paul a nuisance, under certain conditions, was arbitrary, unauthorized, and unconstitutional, because it did not apply to certain others under the same conditions.

It is also well settled, and must necessarily follow, that the protecting provision contained in the Fourteenth Amendment is a limitation upon any power which may be exercised by the State. It prohibits an act done by the executive or the judicial or by the legislative branch of the State Government. (See the opinion of Strong, J., in

Ex parte Virginia, 100 U. S. 339, 347; also, *Ex parte Oelrich*, 42 Fed. Rep. 587; *Scott* v. *McNeal et al.*, 14 Sup. Ct. Rep. 1108 and 1112.)

Therefore, it is no more within the power of the Legislature to pass a law which will deprive one person, or a class of persons, of the equal protection of the laws which is given to other persons in the community, than it is within the power of any executive officer to do so. A legislative act is, therefore, to be tested by the same rule which applies to the act of an executive officer in this respect. Neither can the judiciary of a State so construe an act of the Legislature as to deny to any class in the community the equal protection of the laws. Such act on the part of the judiciary in so construing the law would be in contravention of the principles contained in the Fourteenth Amendment.

There is an able and elaborate opinion by Mr. Justice Matthews upon this provision of the Constitution in the case of *Yick Wo* v. *Hopkins* (118 U. S. 356), a case in which a municipal ordinance aimed at a certain class in the community was held to be unconstitutional. In speaking of a prior decision of the Court, in which an ordinance was held to be valid, he says, on page 367:

"In the application of it there was no invidious dis-
" crimination against any one within the prescribed
" limits; all persons engaged in the same business being
" treated alike, and subject to the same restrictions, and
" entitled to the same privileges, under similar conditions.
" For these reasons, that ordinance was adjudged not to be
" within the prohibitions of the Fourteenth Amendment
" to the Constitution of the United States, which, it was
" said, in the first case cited, 'undoubtedly intended not
" 'only that there should be no arbitrary deprivation of
" 'life or liberty, or arbitrary spoliation of property, but
" 'that equal protection and security should be given to

" 'all under like circumstances in the enjoyment of their
" 'personal and civil rights; that all persons should be
" 'equally entitled to pursue their happiness and acquire
" 'and enjoy property; that they should have like access
" 'to the Courts of the country for the protection of their
" 'persons and property, the prevention and redress of
" 'wrongs and the enforcement of contracts; that no im-
" 'pediment should be interposed to the pursuits of any
" 'one, except as applied to the same pursuits by others
" 'under like circumstances; that no greater burdens
" 'should be laid upon any one than are laid upon others
" 'in the same calling and condition,'" etc.

On page 368, in speaking of the Fourteenth Amendment, he says:

"These provisions are universal in their application to
" all persons within the territorial jurisdiction without
" regard to any differences of race, of color, or of na-
" tionality; and the equal protection of the laws is a
" pledge of the protection of equal laws."

On pages 373 and 374 he continues:

"Though the law itself be fair on its face and impartial
" in appearance, yet, if it is applied and administered by
" public authority with an evil eye and an unequal hand
" so as practically to make unjust and illegal discrimina-
" tions between persons in similar circumstances material
" to their rights, the denial of equal justice is still within
" the prohibition of the Constitution."

In other words, the law, or the rule of conduct as found in the law, must be applicable to all alike under the same circumstances and conditions, whether such persons be artificial or natural.

In the *Railroad Tax Cases* (13 Fed. Rep. 722), in which there was an attempt to tax railroad corporations by a different rule than individuals, it is held that the equal

passed in 1872 that no person should recover damages from any city for any injury to property claimed in consequence of any defect, provided said damage be done to any person who was at the time a resident of any country where damages under similar circumstances were not recoverable by the laws of said country. This provision was held to be in conflict with the Fourteenth Amendment to the Federal Constitution. In that case it will be seen that the Legislature created a class and attempted to discriminate against them.

Therefore, while it is apparent that the Legislature may regulate a given business and prescribe rules and regulations for its conduct, yet such regulations must affect all who are engaged in the same or similar business and under the same or similar circumstances; that a distinction cannot be based solely upon the classification of employers or employés; that the law must be one general in its nature, affecting all alike under the same circumstances—in other words, that under a given state of facts the same liability shall attach to all persons or corporations, irrespective of the question whether such persons be natural or artificial.

It is upon this ground and this construction of the act that the Supreme Court of the United States sustained the constitutionality of the Kansas law of 1874 so far as applicable in the case of the *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205. In that case Mackey was an engineer who was injured while engaged in the perilous business incident to the operation of the railroad. He, therefore, fell within the constitutional construction of the law, and in that case this Court was not called upon to determine what would be the effect if the law were so construed as to embrace one who was not engaged in the perilous business incident to the operation of the railroad, or subject

to perils which are incident only to the ordinary operation of a railroad. On page 210 the Court says in that case, as a justification for its decision :

" But the hazardous character of the business of oper-
" ating a railway would seem to call for special legisla-
" tion with respect to railroad corporations, having for its
" object the protection of their employés as well as the
" safety of the public. The business of other corpora-
" tions is not subject to similar dangers to their em-
" ployés, and no objections, therefore, can be made to the
" legislation on the ground of its making an unjust dis-
" crimination."

In the case of *Minneapolis Railway Co.* v. *Beckwith* (129 U. S.) the decision in the Mackey case is referred to on page 33 of the opinion, and is placed upon this ground :

" That the hazardous character of the business of oper-
" ating a railway called for special legislation with re-
" spect to railroad corporations, having for its object the
" protection of their employés as well as the safety of the
" public, which was not required by the business of other
" corporations not subject to similar dangers to their em-
" ployés."

On pages 28 and 29, in speaking of the Fourteenth Amendment, the Court says :

" That clause does undoubtedly prohibit discriminating
" and partial legislation by any State in favor of particular
" persons as against others in like condition. Equality
" of protection implies not merely equal accessibility to
" the courts for the prevention or redress of wrongs and
" the enforcement of rights, but equal exemption with
" others in like condition from charges and liabilities of
" every kind."

the rights and privileges were granted by the State to corporations, such rights and privileges might be altered, amended, or repealed without impinging upon that provision in the Federal Constitution which prohibits a State from passing any law impairing the obligation of a contract, because the right to amend or repeal constituted a part of the contract. The franchise of being a corporation, and the rights and privileges usually granted to such corporations, are those which a private individual cannot exercise in his private capacity, and, therefore, so far as merely such rights and privileges are concerned, where the right is reserved to amend or repeal the laws which grant them, such amendment would not deprive the corporations of the equal protection of the laws, because such laws would apply to all under the same circumstances and conditions. The power reserved to amend or repeal such laws granting such peculiar privileges does not extend beyond this, and contains no authority or right to the State to violate some other provisions of the Federal Constitution.

In the case of *Tomlinson* v. *Jessup* (15 Wall.), Mr. Justice Field says on page 458, speaking of such a provision :

"The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation."

See, also, *Railroad Company* v. *Maine*, 96 U. S. 510, 511.

It would not be contended for a moment that because a State has reserved the power to amend or repeal the laws granting corporate rights and privileges, that, therefore, the State might pass a law which would deprive a corporation of its property without due process of law, or take such property without making just compensation for it. The law of Kansas of 1874, complained of, is in no sense an amendment of any right, privilege, or franchise granted to corporations under the laws of that State. Now, if a State cannot constitutionally, by even a law passed in the guise of an amendment, take the property of a corporation without due process of law, or take the property of any class of corporations without making just compensation therefor, assuredly there exists no greater power on the part of a State of denying to such corporation, or class of corporations, the equal protection of the laws.

The Police Power.

It will perhaps be argued, as it usually is, that the act of 1874 was passed in the exercise of the police power of the State, and therefore the exercise of such power is above constitutional restraint or limitation. But the police power of a State is no greater than any other sovereign power to be exercised by the State, and under the guise of passing a law under such power the State is not at liberty to contravene any provision of the Federal Constitution intended for the protection of the people at large. It must be admitted that the power of the Legislature to prescribe or fix rates to be charged by a railroad company is an exercise of the police power, and yet in the case of the *Chicago, etc., Rld. Co.* v. *Minnesota* (134 U. S. p. 418) legislation on the part of the State of Minnesota which created a commission having the power to

fix rates absolutely was held unconstitutional, as in contravention of the provisions of the Fourteenth Amendment, because it deprived the railroad companies of property without due process of law, and in so far as it is thus deprived, while other persons were permitted to receive reasonable profits upon their invested capital, the company was deprived of the equal protection of the laws. (See page 458 of the report, and to the same effect is the decision of this Court in the case of *Reagan* v. *Farmers' Loan & Trust Co.*, 14 Sup. Ct. Rep., pages 1047 and 1054.)

In *Leisy* v. *Hardin* (135 U. S. 100) prohibitory liquor laws were held in certain cases to be in contravention of the Constitution.

If it be necessary to enact a law, either in the legitimate exercise of the police power or in the guise of such an exercise, such law should operate upon all persons in the community under like circumstances and conditions, regardless of the fact whether such persons be natural or artificial. Otherwise, the decision of the Court that corporations are persons within the meaning of the Fourteenth Amendment would not be sound.

No valid reason can be given why the police power of the State should be arbitrarily levied against one class of persons in the community, when all others under the same facts, circumstances, and conditions are free from the operation of such a law.

As corporations organized under the laws of the State are persons within the intendment of the Fourteenth Amendment, it is manifest that no just or valid distinction for class or partial legislation can be based upon the ground that it is aimed at corporations as such, or against a certain class of corporations. The distinction taken by Judge Mitchell in the case of Johnson *v.* The Railroad Company, *supra*, is the only logical one. The Fourteenth Amend-

ment embraces a great principle. It forever declares and secures the equality of all under the law, and the protection of the weak against the strong who happen for the time being to be in the majority, and are exercising the sovereign power of the State delegated to them by the people. The same rule of conduct which the sovereign power of the State prescribes for one individual or class of persons in the community must be applicable to all other individuals or classes of persons in the same community under the same conditions or circumstances. So construed, it protects the weak against the strong, the minority against the majority. It prevents the horde which sometimes takes possession of the legislative halls from passing laws applicable only to those who do not fall within their favored class. It prevents them from passing laws that they would not consent should be applicable to themselves or their favored classes. Its wise and just provisions should not be frittered away by distinctions which have no just or reasonable foundations.

Therefore, the construction which the Supreme Court of Kansas gave to the act of 1874 and which renders the plaintiff in error liable to the defendant in error in this case, when individuals and other corporations, such as bridge companies, are not liable under the same circumstances, renders the act of 1874 in conflict with the Fourteenth Amendment to the Federal Constitution, and as applied to this case, unconstitutional and void.

We therefore submit that the judgment of the Supreme Court of Kansas in this case should be reversed, and the case remanded for further proceedings.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.